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Supreme Court of the United States

No. 71-103
OCTOBER TERM, 1971

THE GOODYEAR TIRE & RUBBER COMPANY,
Petitioner,

v.

H. K. PORTER COMPANY, INC.,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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IN THE

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October Term, 1971

THE GOODYEAR TIRE & RUBBER COMPANY,
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H. K. PORTER COMPANY, INC.,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

INTRODUCTORY STATEMENT

The filing of the Petition herein arises solely out of the Petitioner's dissatisfaction with the Findings of Facts and Conclusions of Law which formed the basis of the decision and judgment of the District Court, as affirmed unanimously by the Court of Appeals for the Sixth Circuit [437 F. 2d 244 (1971)]. Pursuant to these decisions, the relevant claims of Respondent's Caplan Patents Nos. 3,050,087 and 3,194,705 (hereinafter '087 and '705) were held valid and infringed.

In its petition, Petitioner merely presents to this Court the same factual and legal arguments which it has already twice urged unsuccessfully below.

The Petition herein should be denied for the reasons that:

(1) There is no conflict of decisions between or among the lower Courts as to either of the two patents in suit, which have not been adjudicated in any other litigation;

(2) The Petition presents no question of federal law;

(3) There is no constitutional issue involved in this litigation;

(4) None of the other reasons suggested in Rule 19 of this Court for the granting of a Writ of Certiorari is present in this case; and

(5) The Petition is untimely.

COUNTER-STATEMENT OF THE CASE

Petitioner's "Statement of the Case" is an incomplete statement of the essential facts in the action below, coupled with arguments which are without merit and which will be answered hereinafter, and hence the present counter-statement is deemed necessary.

The action below was a conventional action for patent infringement which presented no unusual questions of patent infringement or validity. Respondent's '087 and '705 patents were duly and properly issued by the United States Patent Office and the relevant claims thereof here in issue were sustained as valid and infringed by the District Court (R.App. 8-36)*, whose decision was unanimously affirmed by the Court of Appeals for the Sixth Circuit (R.App. 1-7).

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*All references herein to the Appendix to Respondent's brief are designated "R.App." For convenience, the decisions of the Courts herein below and all statutes and rules cited in this brief are reproduced in said Appendix.

The '087 patent relates to and claims a flexible, mold-formed automotive radiator hose which is especially designed for use as a replacement for factory-installed original radiator hose. The '705 patent discloses and claims a method of manufacturing flexible, mold-formed automotive radiator hose (R.App. 1-2; 9-10). The inventions of these patents have enjoyed substantial commercial success. Prior to the commencement of Petitioner's infringing activities, Respondent made substantial sales of its patented hose, including significant sales thereof to Petitioners (R.App. 6-7). When Petitioner undertook its own production of flexible radiator hoses, its accused hose and method, as the District Court found, were actually "patterned after the plaintiff's [Respondent's] patented article and method" (R.App. 21).

In the Petition, there is no denial of infringement of either the '087 or of the '705 patent, although the defense of non-infringement as to both patents was urged vigorously below.

Likewise, it appears that the Petitioner, in this Court, does not challenge in any respect the validity of the '087 patent since the Petition is entirely silent in regard to the '087 patent and deals exclusively with the issue of the validity of the claims of the '705 patent. The Petitioner does contend that the '087 patent and the '705 patents involve only one inventive concept (P. 6)*, as though to imply that the validity of the '087 patent is, in some mysterious manner not explained, dependent upon the validity of the '705 patent. However, the '087 and '705 patents, and the relevant claims thereof in issue, define

*All references herein to the Petition are designated "P".

separate inventions* and by statute are each presumed to be independently valid.**

In the Courts below, the Petitioner attacked the validity of the claims of the '705 patent in issue upon numerous grounds but, with one exception which will be discussed hereinafter, all of such defenses challenging the validity of the claims of the '705 patent have been abandoned, including the defense of alleged "obviousness" under 35 U.S.C. § 103 (R.App. 37-38).

The sole defense now asserted by the Petitioner as to the validity of the claims of the '705 patent, in issue, relates to the legal effect of a Patent Office interference proceeding, or priority contest, between the then-pending patent application which ultimately matured into the Caplan '705 patent, in suit, and claims 16-19 of a patent which had previously issued to one Robert E. Roberts as Patent No. 2,936,812 (hereinafter the '812 patent). This defense was fully considered by both Courts below and both Courts ruled thereon adversely to the Petitioner (R.App. 3-5; 25-26, 28, 30).

The main count or claim of the interference proceeding in the Patent Office was claim 16 of the '812 patent, which was so broadly worded that it was readable, in words, upon a common aspect of the method disclosed in the Roberts '812 patent and the method disclosed in the then-pending application for the Caplan '705 patent.***

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*The Patent Office found that there were separate inventions involved and required separate applications directed to each of such inventions, pursuant to the provisions of 35 U.S.C. § 121 (R.App. 38). (Ex. Vol. 58-60.) All references to the Exhibit Volume on appeal containing copies of Plaintiff's and Defendant's trial exhibits are designated "Ex. Vol."

**35 U.S.C. § 282 (R.App. 38).

***The common aspect of the mold-curing method disclosed in the '812 patent and the mold-forming method of the then-pending application for the Caplan '705 patent was the use of a mold. This is the only feature that the two methods had in common. Despite this common aspect, the Court of Appeals found the Caplan method, as patented, to be inventively different from the method disclosed by

The application for the Roberts '812 patent was filed *after* Caplan had filed his application. Moreover, claim 16 and the other claims involved in the interference were not added until Roberts filed a continuation-in-part application in 1957 (R.App. 25), after he had already seen the Caplan process of the '705 patent in commercial operation (Ex. Vol. 257-263). Nevertheless, the Roberts '812 patent issued while Caplan's application for the '705 patent was still pending.

Caplan then copied into his application claim 16 and certain other broad claims of the Roberts '812 patent for the purpose of enabling the Patent Office to declare or institute an interference proceeding in order to determine priority of invention as to the subject matter of these broad claims. After the Board of Patent Interferences in the Patent Office had awarded priority of the broad claims or interference counts to Roberts, Caplan cancelled from his application the claims involved in the interference and submitted new claims to the Patent Office directed to the particular, specific method of his own invention for making flexible, **mold-formed** automotive radiator hose. These new claims, directed to Caplan's own specific method for making **mold-formed** automotive radiator hose, were then fully considered by the Patent Office, after the termination of the interference proceeding, and with full knowledge thereof by the Patent Examiner as to the results of the then-terminated interference. After such consideration, these new claims were allowed and the '705 patent here, in suit, was granted to Caplan (R.App. 3-4; 28, 30).

It is these new claims of the '705 patent here, in issue, which were held valid and infringed by both Courts below.

Roberts (R.App. 5). Rule 205(b) of the Patent Office Rules of Practice, relied upon so heavily by Petitioner, does not require that two disclosures be **identical** or co-extensive in order to interfere, but only that the disclosures have some common aspect upon which the words of the claim or count in interference are readable. (R.App. 37).

ARGUMENT

I

THE BLONDER-TONGUE DECISION OF THIS COURT HAS NO APPLICATION TO THE FACTS IN THE PRESENT CASE

The first question presented by the Petitioner for this Court's review is set forth in the petition as follows (P. 2):

> "Whether the Court of Appeals for the Sixth Circuit, in view of the rule announced by this Court in *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation et al.*, erred in failing to consider petitioner's plea against respondent as an estoppel based on a prior decision by the Patent Office Board of Patent Interferences, on the same issue presented to the Courts below?"

Petitioner, in its argument in support of its position as to Question One (P. 9-14), erroneously attempts to construe this Court's decision in the case of *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation et al.* 402 U.S. 313 (1971) as being applicable to the totally different fact situation involved in the present case. Petitioner, in effect, is attempting to have this Court believe that a question of federal law is here involved where none, in fact, exists.

Thus, in *Blonder-Tongue,* the Isbell Patent No. 3,210,767, which related to a radio and television antenna, had been held invalid by the Court of Appeals for the Eighth Circuit but was, nevertheless, subsequently held valid and infringed by the Court of Appeals for the Seventh Circuit. Prior to *Blonder-Tongue,* this Court had held in *Triplett* v. *Lowell,* 297 U.S. 638 (1936) that an adjudication adverse to any or all of the claims of a patent did not

preclude another suit upon the same claims against a different defendant.

This Court's decision in *Blonder-Tongue* modified the *Triplett* decision and enunciated the doctrine that a patentee in patent litigation is estopped from asserting the validity of a patent which had already been held invalid in prior litigation unless the patentee can establish that he did not have a full and fair opportunity to litigate the validity of his patent in the prior action.

In the present case, after the termination of the Roberts-Caplan interference, the claims or counts there involved were cancelled from the then-pending Caplan application for the '705 patent (R.App. 3-4). The relevant issued claims of the '705 patent, found to be valid and infringed by the Courts below, were *never involved* in said interference and were fully and carefully considered by the Patent Office and granted to Caplan after the termination of the interference and with full knowledge thereof (R.App. 4; 28).

The fundamental difference between the facts of *Blonder-Tongue* and the case at bar is that the prior decision of the Patent Office Board of Patent Interferences in the Roberts-Caplan interference *did not involve the same issues* as were presented to the Courts below.* The claims of the '705 patent here in suit are directed to a totally different invention than were the counts of the Roberts-Caplan interference. (R.App. 3-5). This fact was recognized by the Patent Office in allowing the relevant claims of the '705 patent after the termination of the interference and with

*Another obvious difference between *Blonder-Tongue* and the present case is the fact that the "prior decision" relied upon by Petitioner (P. 3) was not a final determination of a Federal Court as to the validity of an issued patent, as in *Blonder-Tongue*, but merely an interlocutory decision by an administrative tribunal, made at one point during the prosecution of the application for the '705 patent.

full knowledge thereof (R.App. 28, 30). The same fact was also recognized by the Court of Appeals for the Sixth Circuit, which held in sustaining the validity of these claims, as follows (R.App. 4):

> "Goodyear's claim of prior invention rests primarily on Roberts' victory over Caplan in Patent Interference No. 91,640. This proceeding concerned an alleged conflict between Roberts' Patent No. 2,936,812 and claims 1 through 4 of Caplan's '705 patent. The Roberts patent prevailed, and the Caplan '705 application was therefore modified and, as modified, was the basis of the patent issued by the Patent Office. That agency specifically took notice of the interference proceeding, and held that Caplan's patent was valid nevertheless." [437 F.2d at 246]

Thus, rather than ignoring the results of the Roberts-Caplan interference, as Petitioner accuses them of doing (P. 9-14), the Courts below took specific cognizance not only of the interference, but of *all* other proceedings which transpired in the Patent Office and which resulted in the issuance of Respondent's '705 patent (R.App. 4; 28).

Petitioner, of course, chooses to ignore subsequent events in the progress of the application for the '705 patent through the Patent Office and focuses attention solely upon the interference. The Courts below, however, rightfully considered not only this isolated matter, but reviewed the entire prosecution of the application for the '705 patent, concluding, as did the Patent Office, that the claims *as ultimately presented and issued* therein were for a totally different and distinct invention from that involved in the counts of the interference (R.App. 3-5; 28, 30).

Therefore, the facts of the present case bear no resemblance to those of *Blonder-Tongue,* and it is respectfully submitted that neither the reasoning nor the decision in *Blonder-Tongue* has any application to the present case. Accordingly, no reason has been presented under Petitioner's Question One warranting the granting of the Petition for a Writ of Certiorari.

II

THE COURTS BELOW CORRECTLY INTERPRETED AND APPLIED THE ROBERTS-CAPLAN INTERFERENCE COUNTS

The second question which the Petition presents for this Court's consideration, reads as follows (P. 2):

> "Whether the Court of Appeals for the Sixth Circuit erred in failing to apply a count of a patent interference as prior art for what it plainly states on its face, and for what it clearly teaches the reader as though it were a page in a text."

In thus presenting its second question, Petitioner takes issue with the manner in which the Courts below interpreted and applied the broad count of the Roberts-Caplan interference (P. 15-21). Petitioner erroneously contends that the count (claim 16 of the '812 patent) of that interference should be read and considered in a vacuum, and without regard to the actual invention covered thereby, as disclosed in the specification and drawings of the Roberts '812 patent in which the claim or count originated. Thus, Petitioner would have this Court abandon a basic rule of patent claim construction which this Court and subordinate courts have consistently followed for over a hundred years.

This Court had occasion to restate its basic rule of claim construction in the case of *U.S.* v. *Adams,* 383 U.S. 39

(1966). In that case, in which this Court held the patent there involved to be valid, it was stated, at pages 48-49:

> "While the claims of a patent limit the invention, and specifications cannot be utilized to expand the patent monopoly, *Burns* v. *Meyer,* 100 U.S. 671, 672 (1880); *McCarty* v. *Lehigh Valley R. Co.,* 160 U.S. 110, 116 (1895), it is fundamental that claims are to be construed in the light of the specifications and both are to be read with a view to ascertaining the invention, *Seymour* v. *Osborne,* 11 Wall. 516, 547 (1871); *Schriber-Schroth Co.* v. *Cleveland Trust Co.,* 311 U.S. 211 (1940); *Schering Corp.* v. *Gilbert,* 153 F. 2d 428 (1946)."

The Court of Appeals for the Sixth Circuit held to the same effect in the case of *FMC Corporation* v. *F. E. Myers & Bro. Co.,* 384 F. 2d 4 (6 Cir. 1967) at page 13, where the Court stated:

> "And 'the claim of a patent must be read in the light of the invention disclosed and cannot be given a construction broader than the teachings of the patent as shown by the drawings and specifications.'"

The Court of Appeals in the present case properly followed the long-standing rule of claim construction set forth in *Adams,* stating (R.App. 4-5):

> "Any conflict between the language of claim 16 of the '812 patent and the '705 patent assumes significance only if the invention disclosed by the language, drawings, and specifications of the '812 patent conflicts with the invention claimed and disclosed in the '705 patent. *See e.g., FMC Corp.* v. *F. E. Myers & Bro. Co.,* 384 F. 2d 4, 13 (6th Cir.

1967). Here the District Court found, and we agree, that there was no such conflict.

Anticipation by prior art. Goodyear's claim of anticipation by prior art also rests primarily on Interference No. 91,640. It also argues that claims involved in an interference are prior art against the loser of the interference: *In re Risse*, 378 F.2d 948, 956 (CCPA 1967). But that proposition misses the point raised by plaintiff; that its invention, as ultimately patented, is inventively different from the Roberts '812 patent.

The facts, as found by the District Court, support plaintiff's contention. It found that the Roberts hose is preformed and hand-corrugated on a mandrel and then placed in a mold for curing and vulcanization. This process may be referred to as mold-curing. The Caplan hose, on the other hand, is mold-formed by putting the separate components in a mold, in which they are molded and vulcanized in the same operation. These findings are supported by evidence in the record and are not clearly erroneous." [437 F.2d at 246]

The authorities relied upon by the Petitioner on this point are inapplicable (P. 16-18). The Petitioner cites this Court's decisions in *Aro Manufacturing Co., Inc.* v. *Convertible Top Replacement Co. Inc.* 365 U.S. 336 (1961), and *Universal Oil Products Co.* v. *Globe Oil and Refining Co.*, 322 U.S. 471 (1944), and the decision of the Court of Appeals for the Sixth Circuit in the case of *Maxon* v. *Maxon Construction Company, Inc.*, 395 F.2d 330 (6th Cir. 1968), as standing for the proposition that the claims of a patent are the sole measure of the patent grant. With this general proposition, Respondent has no quarrel. But, Petitioner's argument misses the point.

The issue, in the case at bar, is not the extent of the patent grant conferred by the claims of a patent, as in *Aro, Universal* and *Maxon*. Rather, the issue presented in this case is whether or not the invention, as ultimately patented in the issued claims of the Caplan '705 patent, is inventively different from the invention of the Roberts '812 patent. And, for this determination, one must look to the entire disclosure of each patent, including the specification and drawings. This is the basic tenet of patent claim interpretation reaffirmed by this Court in *Adams* and applied herein by the Courts below.

The cases of *Phillips* v. *Lynch*, 367 F.2d 601 (CCPA 1966) and *Vogt* v. *McFeaters*, 341 F.2d 315 (CCPA 1965), from which Petitioner has carefully selected language used by the Court of Customs and Patent Appeals, are also inapposite. In *Phillips* and *Vogt*, the Court was simply stating that, under established Patent Office practice in interference proceedings between an issued patent and a pending application, the Board of Patent Interferences may not consider whether unambiguous claims or counts which originated in the issued patent are supported by the specification thereof or if such claims are, in fact, broader than the disclosed invention.* Neither *Phillips* nor *Vogt* dealt with the issue in the case at bar of whether the issued claims of the Caplan '705 patent are patentably distinct from the invention of the Roberts '812 patent. In such a situation, the rule espoused by this Court in *Adams* is applicable.

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*In the Roberts-Caplan interference, since the Roberts '812 patent had already issued prior to the interference, neither Caplan, nor the Board of Interferences itself, was in a position to challenge the breadth of claim 16 and the other Roberts claims involved in said interference. Thus the Board noted:

> "We can not, of course, consider whether the counts are broader than Roberts' invention (Trumbull et al. v. Kirschbraun, 21 CCPA 758, 67 F(2) 974, 1934 CD 191, 443 O.G. 567)." (Ex. Vol. 140g-140h)

In its efforts to convince this Court that claim 16, standing alone, discloses a separate and distinct method of making a flexible radiator hose apart from the single method disclosed in the Roberts '812 specification, Petitioner accuses the Courts below of engaging in a "strained interpretation" of claim 16 to limit it to the "preferred embodiment of the invention", as disclosed in the specification and drawings of the Roberts '812 patent (P. 8, 17). Instead, the Courts below simply recognized that there was *no support whatsoever* in the Roberts '812 patent for Petitioner's interpretation of claim 16 (R.App. 4-5; 25-26). Even Petitioner's expert witness repeatedly admitted at the trial below that *such interpretation,* as now urged by Petitioner, was *in no way supported* anywhere in the specification of the Roberts '812 patent (App. 284-285, 315).*

Petitioner attempts to gloss over the specific findings of the Courts below by relying heavily upon the cases of *In re Field,* 161 F.2d 372 (CCPA 1947); and particularly, *In re Risse,* 378 F.2d 948 (CCPA 1967), to argue that the interference count (claim 16 of the '812 patent) is prior art against the Caplan '705 patent (P. 18). The Court of Appeals below disposed of this very point, unanimously holding (R.App. 4):

> "*Anticipation by prior art.* Goodyear's claim of anticipation by prior art also rests primarily on Interference No. 91,640. It also argues that claims involved in an interference are prior art against the loser of the interference. *In re Risse,* 378 F.2d 948, 956, (CCPA 1967). But that proposition misses the point raised by plaintiff; that its invention, as ultimately patented, is inventively different from the Roberts '812 patent.

*References herein to the joint Appendix on appeal containing stipulated parts of the trial transcript are designated "App.".

> The facts, as found by the District Court, support plaintiff's contention." [437 F.2d at 246]

The Patent Office, in granting the relevant claims of the '705 patent after the Roberts-Caplan interference and with full knowledge thereof, specifically considered as part of the *prior art* the Roberts '812 patent including claim 16 thereof.* Thus, the Patent Office, the District Court and the Court of Appeals, in sustaining the validity of the '705 patent were all unanimous in finding that the claimed invention of the '705 patent was indeed clearly and inventively different from that embodied in the Roberts '812 patent. (R.App. 3-5; 25-26, 28, 30). Hence, *In re Risse* and the other Court of Customs and Patent Appeals authorities relied upon by the Petitioner (P. 16-18) have no application to the case at bar.

It is apparent from the arguments advanced by Petitioner in support of the issues framed by its Question Two (P. 15-21) that Petitioner, dissatisfied with the factual findings made by the Courts below as to the nature of the Caplan invention of the '705 patent, seeks in this Court a review *de novo* of the factual evidence presented below and the findings based thereon. Petitioner, however, is not entitled to such a review here, as this Court clearly ruled in the case of *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100 (1969).

Thus, it is respectfully submitted that the Courts below correctly and properly interpreted and applied the language of claim 16 of the Roberts '812 patent in sustaining the validity of the relevant claims of the '705 patent, and that Petitioner's arguments to the contrary are without merit. Hence, no reason has been presented under Petitioner's Question Two, warranting the grant of the Petition for a Writ of Certiorari.

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*This is in accord with the holdings of the CCPA in *Field* and *Risse*, as quoted in the Petition (P. 17, 18).

III

THE PETITION SHOULD BE DENIED BECAUSE OF UNTIMELY FILING IN VIOLATION OF THE APPLICABLE STATUTE, 28 USC 2101 (c)

The Petition is not only factually and legally without merit, but it is also untimely, since it was filed beyond the time limit prescribed by the applicable statute, 28 USC 2101 (c), which states:

> "Any other appeal or writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days."

In the present case, the judgment of the Court of Appeals for the Sixth Circuit, to which the Petition is directed, was entered on *January 27, 1971*, and an order of that Court, denying a petition for rehearing was entered on *April 16, 1971*. Thus, the present Petition was due for filing in this Court on or before *July 15, 1971*, within the ninety (90) day period allowed by the applicable statute, 28 USC 2101 (c). However, the present Petition for Writ of Certiorari, though timely served by mail upon Respondent's counsel, was not docketed in this Court until *July 20, 1971*, ninety five (95) days after the entry of the order of the Court of Appeals for the Sixth Circuit, denying the petition for rehearing. Petitioner did not apply for nor was it granted any enlargement of the ninety (90) day period in which to file the present Petition pursuant to Rule 34 of this Court. Nor has any reason been advanced by Petitioner for its late filing in this Court. Hence, the filing

of the Petition was untimely, and in view thereof, the Petition should be denied. *Department of Banking* v. *Pink*, 317 U.S. 264 (1942).

CONCLUSION

For the reasons stated, and under the authorities cited, the Petition is without merit, as well as untimely, and it should be denied.

Respectfully submitted,

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